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No. 80-1620

IN THE

Supreme Court of the United States

October Term, 1980

CITY OF PHILADELPHIA,

Petitioner,

v.

SUSAN JANE B. GILFILLAN, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Does the Establishment Clause of the First Amendment to the Constitution of the United States forbid the expenditure of public funds for a specially-designed platform topped by a cross, a choir stall, rented chairs, sound equipment, landscaping and other items used only for a Roman Catholic Mass, attendance at which was limited to those bearing tickets issued by the Church?

(Answered by the lower courts in the affirmative)

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Susan Jane B. Gilfillan, American Civil Liberties Union—Greater Philadelphia Branch, Reverend Mary Anne Forehand, and Board of National Ministries—American Baptist Churches in the U. S. A. respectfully request that this Court deny the petition for writ of certiorari.

COUNTER-STATEMENT OF THE CASE

On September 11, 1979, then-Mayor Frank Rizzo sparked the controversy out of which this lawsuit grew by announcing that the City of Philadelphia would build, at taxpayers' expense, a 27-foot high "altar" (as the Mayor called it) to be used solely for a Papal Mass on October 3, 1979. According to accounts in all three of the City's major newspapers, the Mayor stated, "The Church offered to pay for it, but I think it's our responsibility . . .". [C. A. App. 87a-89a].

Pope John Paul II arrived in Philadelphia early in the afternoon of October 3, on a six-city "pastoral visit". The Governor, Mayor and other civil dignitaries greeted the Pope upon a platform at the airport, high school bands played, and the Pope rode in a motorcade to the Basilica at Logan Circle. Expenditures for these activities are not challenged.

After brief remarks in the Cathedral, the Pope emerged at the head of an exclusively clerical procession, preceded by a Crucifix. He mounted the structure which had been built above the Swann Fountain, and celebrated a high solemn Mass.

Forty bishops concelebrated the Mass with the Pope, who personally gave Communion to 150 persons while over 1,000 priests fanned out in the vast reserved areas (*see*, pp. 4-5, *infra*) distributing Communion to another 250,000 or so worshippers.

Pope John Paul began his sermon by announcing:

> We have come together to proclaim the Gospel in all its power, for the Eucharistic sacrifice is the summit and enactment of our proclamation: Christ has died, Christ is risen, Christ will come again!

Aside from the development of the significance, in Catholicism, of the celebration of the Eucharist, the Pope referred repeatedly to the Bible, to the teachings of the Vatican Second Council, to various Encyclicals, to Dignatatis Humanae I, and to such Christian doctrines as the divinity of Jesus Christ and such Catholic doctrines as the celibacy of the priesthood.

The Pope then descended to the Parkway and proceeded some distance through the crowds, bestowing blessings and benedictions.

The Logan Circle platform, beautifully conceived by a team of City architects, was so located and designed as to be veritably the crossing (the intersection of Nave, Apse and Transept) of an open-air church. The "platform" bore little resemblance to the kinds of platforms that are built for Philadelphia's Mummers' Parade or the speeches of visiting dignitaries in front of Independence Hall. The architect's rendering of the structure is appended to the District Court's opinion; a photograph of the Papal Mass [Trial Exh. D-1] is reproduced in the Appendix to this Brief. As the District Court found, "The design and structure of the platform emphasizes its religious nature" [Pet. App. 11a].

Atop the platform, the City installed a 36-foot high Christian Cross, designed by City architects and built by City workmen. It was in place and lighted at City expense a week before the Pope's arrival and, by special order of the Mayor, it remained in place for over two weeks after the Mass.

The cross dominated the landscape and, according to Commissioner of Public Property Silver, was located off-center so that television shots would show it in vertical juxtaposition with the City Hall tower, which he called "our shrine".

A separate platform was built for a 360-voice choir. A City-supplied public address system broadcast the Pope's celebration of the Mass, and 140 speakers carried his sermon the ten blocks from the Art Museum to Kennedy Plaza. The City rented 20,000 chairs for distinguished church officials and guests.

All of this was supplied by the City of Philadelphia at taxpayers' expense. The Archiocese then provided the various accoutrements of the ritual, such as candelabra, candles, pitchers and goblets.

City officials and representatives of the Archdiocese met repeatedly to plan the Mass at Logan Circle and the structure upon which the Pope would conduct it. Sketches of the platform were shown to and approved by the Archdiocese [Pet. App. 5a]. This planning proceeded separately from and independently of the planning for police, fire, emergency and security functions [C. A. App. 78a-79a, 107a-108a].

The District Court found that the City's "security" and "access" concerns, albeit sincere, were "incidental" to the non-secular purpose of "public sponsorship of a religious service" [Pet. App. 11a].

The District Court found, too, that "The City in effect ceded control of the Logan Circle area to the Archdiocese of Philadelphia, which had the sole responsibility for distributing tickets for admission to [the] area . . ." [Pet. App. 11a]. The Court of Appeals agreed. The parties stipulated that tickets were required for admission to the vicinity of Logan Circle from 16th Street to 21st Street, and from Cherry Street to Callowhill Street—the entire area within which the Papal Mass could be seen and heard. Tickets were available only through Catholic parishes and institutions of the Archdiocese which issued 21,000 tickets for the seated area and 200,000 for reserved standing areas. [C. A. Supp. App. 22a]. The City Hall telephone oper-

ator referred ticket inquiries to the Archdiocese. Two witnesses testified that, when they went to the vicinity of the Circle and Benjamin Franklin Parkway, they were told by policemen that entry into the area was in the hands of the marshals appointed by the Archdiocese. At at least six different points from 16th to 22nd Streets, the marshals told the witnesses that they could not enter without a ticket. Commissioner Silver, who supervised construction of the platform, obtained his tickets from the Archdiocese [C. A. App. 23a-24a, 31a-32a, 45a].

The Logan Circle platform was used for nothing other than the October 3, 1979 Papal Mass.

Appellees did not and do not take exception to (a) the use of the public park at Logan Circle for the Mass, or (b) the expenditure by the City of public funds for traffic control, police protection and other similar functions.

REASONS WHY THE WRIT SHOULD BE DENIED

This is not a close case. The District Court and the majority of the Court of Appeals scrupulously followed the decisions of this Court in finding that challenged expenditures of the City contravened all three prongs of the settled test for Establishment Clause violations. The sole dissent by Judge Aldisert does not purport to be founded upon the established principles of the law of church-state relations.[1]

The City's public safety argument is spurious. The "public relations bonanza" argument is legally invalid. The City spent considerable tax money to provide suitable facilities for the sole purpose of conducting a religious ceremony, admission to which was controlled by a church. It takes considerable forensic sophistry to obnubilate this simple fact.

Nothing more offends the notion of separation of church and state than use of tax money to support any religious teaching, endeavor or observance. The preamble of the Virginia Bill for Establishing Religious Freedom states, "to compel a man to furnish contributions of money

1. Although the dissenting Judge engages in observations with respect to Israel and Iran, the *ratio decidendi* of his opinion is the contention that the Pope, in addition to being a clerical personage, is a head of state: "Had the platform been constructed for a priest, bishop or cardinal visiting the City and celebrating mass, I would have no difficulty agreeing that the expenditures violated the establishment clause. But Pope John Paul II is no ordinary bishop; he is the head of a secular state, albeit a theocratic one" [Pet. App. 40a-41a]. The District Court properly disposed of this point in a footnote:

> "4. The Pope's status as head of state is not relevant to the constitutional issue before the Court. A religious service conducted by a head of state is nonetheless a religious service." [Pet. App. 6a]

for the propagation of opinions which he disbelieves is sinful and tyrannical; . . .".

As *Everson v. Board of Education*, 330 U. S. 1, 16 (1947), unambiguously concluded:

> No tax in any amount, large or small, can be levied to support any religious activities. . . .

Justice Jackson, dissenting, agreed:

> . . . the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense.
>
> *Id.*, at 26.

And Justice Rutledge, writing also for dissenting Justices Jackson, Frankfurter and Burton, joined the majority in forbidding all financial support for religion:

> The [First] Amendment's purpose was . . . to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.
>
> *Id.*, at 31-32.

It is submitted that this is the law, that no novel questions are presented and that it is dispositive of the instant case.

Since *Everson*, the Court has had to wrestle with a number of situations in which the "aid" to religion was debatable, incidental or indirect. Never has there been a case before this Court in which the aid to religion was

as flagrant, direct and gross as the instant case. For here the situation is precisely the same as if City Council had appropriated $204,569 to the Archdiocese. In every other city the Pope visited, the Church paid comparable (or larger) sums for the platform and Mass. In Philadelphia, too, the Archdiocese was initially prepared to assume the platform's expense [Trial Exhibit P-2]. Had the City not built the platform and the cross, the Archdiocese would have.

A. The Platform Served No Secular Purpose.

It is stipulated that the Logan Circle platform was built for the Papal Mass and sermon and used for nothing else. It is undisputed that there was no secular intrusion upon the platform or the Logan Circle ceremony; no City or State officials participated or even set foot upon the structure. "The design and structure of the platform," the District Court found, "emphasize[d] its religious nature [Pet. App. 11a]. The District Court therefore, inevitably, found that the platform was "designed, constructed and used for a religious service . . . and only incidentally for the secular purposes asserted by the City" [Pet. App. 12a]. The majority in the Court of Appeals agreed.

The "safety" argument is an afterthought. City Representative LaSala, the official in charge of the City's preparations for the Pope's visit, testified that the planning for the platform and the Logan Circle events proceeded separately and independently, and involved different people, from the planning for police, fire, emergency and security functions [C. A. App. 78a-79a, 107a-108a]. He never asserted "security" or "crowd control" as a justification for the platform; instead, he invoked "tradition".

The Court of Appeals majority described the "security" and "crowd control" arguments as "at best, sus-

pect" and "only partially true" [Pet App. 29a]. It is apparent from the photographs of the Mass [Trial Exh. D-1; Resp. App. A1] that the platform served no "crowd control" function. The crowd (of invitees of the Archdiocese) was held in check here, as elsewhere throughout the Pope's visit, by ordinary sawhorse barricades (covered for aesthetic reasons with white bunting) placed across the street from the flower-banked platform.

The public safety or Pope's safety argument is fictitious. Indeed, as pointed out by the Court of Appeals, the ultimate position of the Pope at the very pinnacle of the platform's raised dais made him a 360-degree target, particularly from the highrise apartments on the south and southwest segments of the Circle.

The Pontifical Mass of October 3, 1979, may, in fact, have been a "public relations bonanza". The City's "public relations bonanza" argument, however, is legally fallacious. As Madison said in his *Memorial and Remonstrance,* the state cannot "employ Religion as an engine of Civil policy".

Even if the City believed that it was promoting a significant public relations purpose, it did what Justice Brennan found impermissible in *School District of Abington Twp. v. Schempp,* 374 U. S. 203, 295 (1963); i.e., "use essentially religious means to serve governmental ends . . .".

Over the years, historic Christ Church, frequented as it was by Washington and others of the founding fathers, has doubtless been an even greater public relations asset of the City of Philadelphia. No one would contend, however, that that entitles the City to spend one penny upon its maintenance or repair.[2]

2. The restriction of access to the Papal Mass—and to a large part of Center City Philadelphia—to those bearing tickets distributed by the Archdiocese can be justified only by the religious

B. The Structure Aided Religion.

In every other city visited by the Pope the Church paid for the costs of the Mass. The Court of Appeals for the District of Columbia Circuit in *O'Hair v. Andrus*, 613 F. 2d 931 (D. C. Cir. 1979), rejected a challenge to the use of public parkland for the Papal Mass, but went out of its way to point out that in Washington the expenses of the Mass, including the platform, fencing, sound equipment, electrical facilities, portable toilets, first aid stations, and chairs and the removal thereof (as opposed to the costs of police for crowd and traffic control) were paid for by the Archdiocese, in an amount in excess of $400,000. It is self-evident that the Catholic Church was benefited by the City paying for the platform, etc., just as surely as if the sum of $204,569 had been paid directly to the Archdiocese.[3]

The City's contention that this is justified because the aid is a "one-time event" rather than continuous or permanent is utterly devoid of reason or constitutional authority. *Cf. Tilton v. Richardson*, 403 U. S. 672 (1971).

2. (Cont'd.)
nature and purposes of the event and the desire that those present at the Mass be "sympathetic and knowledgeable communicants who will be able to respond appropriately to the celebrants at the various stages of the ceremony." *Baird v. White*, 476 F. Supp. 442, 445 (D. Mass. 1979).

3. The City's aid to the church was not indirect, remote or incidental. *Tilton v. Richardson*, 403 U. S. 672 (1971); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U. S. 756 (1973). If, as *Tilton* held, the government cannot build a structure that *might* be used by a church-related college for sectarian activities two decades later, and if, as was decided in *Nyquist*, the state cannot constitutionally pay for heating, lighting and repairing facilities which *might* be used by a religious school for prayer or religious instruction, *a fortiori* the government cannot, without running afoul of the First Amendment, build a structure to be used *only* for religious worship services.

C. Construction of the Platform "Entangled" the City With Religion.

This case does not involve the kind of entanglement which this Court found to be present in *Lemon v. Kurtzman*, 403 U. S. 602 (1971); i.e. regular monitoring by the state of the activities of a religious entity. It does involve the kind of joint planning and organizing entanglement found unconstitutional in *Allen v. Morton*, 495 F. 2d 65 (D. C. Cir. 1973), indeed to a greater degree than in that case, as set forth in detail in the opinions of both of the lower courts.

Also, to a greater degree than will be found in any of the cases decided by this Court, it involves the kind of entanglement which arises from the fact of (and widely perceived) "sponsorship" of a particular religion. *See Walz v. Tax Commission of the City of New York*, 397 U. S. 664 (1970).

When the mayor publicly refuses to permit either the church or private individual donors to contribute and aggressively insists that it is the City's (i.e., taxpayers') responsibility; when the City then provides a structure which includes an altar and a Christian cross, and both in fact and by public proclamation cedes access to a substantial part of center city to religious authority, it has grossly violated the essential notion of neutrality.

When the state appears to sponsor religious activity, and when state and church become interdependent, the principle of separation is most jeopardized. Indeed, although most Establishment Clause cases involve expenditures of public funds, the essence of the constitutional prohibition is perhaps not so much the expenditure of taxpayers' money to support a religion or a religious event (offensive as that may be), but rather the constitutional repugnance which arises "[w]hen the power, prestige and

financial support of government is placed behind a particular religious belief . . ." with the suggestion that it is the "prevailing officially approved religion . . .". *Engel v. Vitale,* 370 U. S. 421, 431 (1962).

There is yet a third way in which the City's actions violated the Establishment Clause, namely, the promotion of religious divisiveness.

> When government, the Court said, allies itself with one particular form of religion, the inevitable result is that it incurs "the hatred, disrespect and even contempt of those who held contrary beliefs."
>
> *School District of Abington Twp. v. Schempp, supra,* 374 U. S. at 221-222 (quoting from *Engel v. Vitale, supra*).

The record does not support the City's contention that the conclusion of the lower courts that divisiveness had in fact, been engendered was entirely based on the number or identity of parties plaintiff, although the case itself did pit the two largest religious denominations, Roman Catholic and Baptist, against each other. On the contrary, plaintiff introduced as exhibits newspaper articles whose headlines proclaimed, "Blacks Protest Platform" (Exh. P-6), "Protestants Oppose Phila. Building Altar Stand" (Exh. P-7), "Cardinal Krol Blasts ACLU . . ." (Exh. P-8). Acrimonious Letters to the Editor abounded. As predicted by Justice Brennan in his opinion in *Lemon v. Kurtzman, supra,* the then two candidates for mayor were indeed, "forced to declare". One may expect even more acrimonious controversy when other and perhaps more controversial denominations and sects demand equal treatment—an inevitable consequence if judicial approval is conferred upon what the City here has done.

D. No "Free Exercise" Question Is Presented.

Neither the District Court nor the Court of Appeals was able to perceive how either *O'Hair v. Andrus, supra,* or *Chess v. Widmar,* 635 F. 2d 1310 (8th Cir. 1980), *cert. granted sub nom. Widmar v. Vincent,* 49 U. S. L. W. 3617 (Feb. 23, 1981), helps the Petitioner's case. Both concern a prohibition against the use of property (public parkland and the student union on a university campus) for a religious purpose, which is not in issue here. Neither involves the taxpayers paying for the costs of a religious service.

It will be the rare defendant in an establishment case that does not raise the spectre of a correlative free exercise impairment. But "it does not make the state unneutral to withhold what the constitution forbids it to give." *Everson v. Board of Education, supra,* 330 U. S. at 59. Basically, this is the familiar difference between accommodation, on the one hand, and sponsorship and support, on the other. That difference is quite clearly delineated by comparison of the instant case with *O'Hair v. Andrus.* The distinction has also been adequately examined by this Court on previous occasions, most notably by Justice Brennan in his concurrence in *Schempp,* in which he analyzed the distinction between *McCollum v. Board of Education,* 333 U. S. 203 (1948), and *Zorach v. Clauson,* 343 U. S. 306 (1952), in these very terms. The opinion of the Court of Appeals in contrasting the result in the instant case with that in *O'Hair* is clear and correctly applies the law.

CONCLUSION

The City keeps contending that the lower courts held as they did *because* "the setting was too 'splendid' and 'magnificent' ". The City misreads the opinions; the lower courts held that there was a violation of the Establishment Clause *in spite of* the fact that the setting was splendid and magnificent.

For these reasons the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Edward M. Posner, a member of the Bar of the Supreme Court of the United States, hereby certifies that on April 20, 1981, he caused Respondents' Brief in Opposition to be served by mail, first class postage prepaid, addressed to Alan J. Davis, City Solicitor, Room 1580, Municipal Services Building, Philadelphia, Pennsylvania 19107, counsel for Petitioner; Earl W. Trent, Jr., Suite 700, Western Savings Bank Building, Broad and Chestnut Streets, Philadelphia, Pennsylvania 19107, counsel for Respondents Rev. Mary Anne Forehand and National Ministries, American Baptist Churches in the U. S. A.; and John T. Acton, 726 Fitzwatertown Road, Willow Grove, Pennsylvania 19090, counsel for Intervenor-Respondents. All parties required to be served have been served.

EDWARD M. POSNER
Attorney for Respondents

APPENDIX

Trial Exh. D-1
Foldout Color Photograph of the Platform

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